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IN THE

Supreme Court of the United States

October Term, 1941.

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri,

Petitioners,

v.

THE WASHINGTON UNIVERSITY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF.

GEORGE WHARTON PEPPER,
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THE WASHINGTON UNIVERSITY,

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RESPONDENT'S BRIEF.

I.

SUMMARY OF FACTS.

The respondent was organized pursuant to a Missouri statute entitled "An Act to Incorporate the Eliot Seminary.", approved February 22, 1853, Laws 1852-3, Page 290 (R. 4). Section 1 of the Act provided that the incorporators "and their associates and successors are hereby constituted a body corporate and politic by the name of 'The Eliot Seminary' and by that name shall have perpetual succession and be capable of taking and holding by gift, grant, devise or otherwise, and conveying, leasing or otherwise disposing of any estate, real, personal or mixed, annuities, endowments, franchises, and other heredita-

ments which may conduce to the support of said Seminary, or to the promotion of its objects; *all property of said corporation shall be exempt from taxation* and the sixth, seventh and eighth sections of the first Articles of the Act concerning corporations, approved March 19th, 1845, shall not apply to this corporation." (Italics ours.)[1]

The State Constitution of 1820, in force at that time, imposed no limitations on the legislative power to enact local or special laws or laws granting exemption from taxation: *Washington University v. Baumann*, 341 Mo. 708, 712, 108 S. W. (2d) 403 (1937).

The chartering Act of 1853 was amended by the Legislature in 1857, Laws 1857, Page 210 (R. 5). Section 1 of this Act provided: "The name of the corporation known as 'The Eliot Seminary' shall henceforth be 'The Washington University', by which name the said corporation shall have, hold and enjoy all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to The Eliot Seminary." Further sections forbade sectarian, religious or political instruction, and made other provisions for the government of the University, thus making it clear that the legislature desired to define the type of educational effort which it was authorizing.

Missouri adopted a new State Constitution in 1865. Section 27, Article IV, provided: "The general assembly shall not pass special laws . . . exempting any property of any named person or corporation from taxes." In 1866

[1] The Act of 1845 (R. S. 1845, Chapter 34, Page 232), referred to in the exempting clause, provided that the charter of every corporation thereafter granted by the Legislature should be subject to alteration, suspension and repeal in the discretion of the Legislature. (Sect. 7.)

the legislature enacted a new general tax law and pursuant thereto certain real estate of the University was for the first time assessed for taxation. One Edward S. Rouse (also spelled "Rowse"), Collector of St. Louis County, took steps to collect the taxes thus attempted to be imposed. At least three pieces of the realty assessed were productive property, held by respondent as investments and not directly used for educational purposes (R. 86). Respondent brought a suit for an injunction on the ground that its charter exempted its property from taxation. An injunction was granted by the lower court which was reversed on appeal in *Washington University v. Rouse*, 42 Mo. 308 (1868). Respondent sued out a writ of error and the judgment of the Missouri Supreme Court was dissolved by this Court in *Washington University v. Rouse*, 75 U. S. (8 Wall.) 439 (1869). The basis of the decision rendered by a divided Court was that respondent's charter was a contract and that the threatened taxation constituted an impairment of that contract under Article I, Section 10, of the Constitution. The dissenting opinion, while denying that the power of taxation could be bargained away, did not express disagreement with the majority that the charter in other respects constituted a contract.

No further attempt was made to tax any of respondent's property until 1931, when (pursuant to an act passed more than fifty years earlier) some sixty-two parcels of real estate owned by respondent in the City of St. Louis were assessed for State, City and School Taxes in the amount of $183,003.77. All except one of these parcels were productive. Respondent brought a suit against the Collector of St. Louis to enjoin the collection of these taxes; an injunction was issued by the court below; and the decree was affirmed on appeal in *Washington Uni-*

versity v. Baumann, 341 Mo. 708, 108 S. W. (2d) 403 (1937).

While the appeal in the *Baumann* case was pending in the Supreme Court of Missouri (to wit: on November 19, 1934), the present suit was brought against the Assessor and Treasurer of Kansas City to enjoin these officials from selling at a tax sale similar real estate of the respondent located in Kansas City. The officials attempted to justify under the same act which had been unsuccessfully invoked in the *Baumann* case. After a temporary injunction had issued, the case laid dormant until after the decision of the Missouri Supreme Court in the *Baumann* case and was then tried upon an amended petition which raised two issues: First, whether respondent's charter constituted a contract exempting all of its property from taxation and whether the asserted right of taxation constituted an impairment of that contract under the Federal Constitution; and, second, whether the issues were *res judicata* in view of the decisions in the *Rouse* and *Baumann* cases.

The instant suit involves taxes on one lot of Kansas City real estate for the year 1933 and three lots for the years 1934-1937, inclusive. The amounts of the tax bills are as follows: for the year 1933—$23.71; 1934—$7,245.37; 1935—$6,313.77; 1936—$5,724.83; 1937—$5,048.31 (R. 31-44). The financial importance of the suit to the University is of course much greater than these figures indicate. As mentioned above, the taxes involved in the *Baumann* case amounted to $183,000. for a single year, and these were assessed against some only of the respondent's property.

As the issues in the instant case and those in the *Baumann* case are identical, it was agreed that the transcript of the testimony in the *Baumann* case should be part

of the record in the instant case, and it was upon this record that the instant case was decided (R. 56).

This testimony was summarized by the Supreme Court of Missouri in the *Baumann* case as follows (p. 716):

> "The undisputed evidence shows that when The Washington University v. Rouse case was being litigated in the courts of this State and the United States Supreme Court between 1867 and 1871, the University owned only four pieces of income real estate not occupied and directly used for school purposes. The petition describes sixty-two parcels of real estate in St. Louis as being owned by it now. All except one parcel are income property only. The taxing authorities are not attempting to tax many other parcels owned and actually used by it for school purposes. (It appears the University also has substantial real estate holdings in St. Louis County, outside of the city, which have not been taxed.) The evidence treats only of sixty parcels in the city. Of these twenty-eight were gifts; six were obtained in exchange for other real estate; and twenty-six were purchased out of endowment funds and gifts. Ten of these twenty-six parcels were bought for a contemplated addition to the Medical School. The others were not acquired with a view to future occupancy and direct use by the University. It got the great bulk of its real estate in and after 1900. In that year twelve valuable parcels of land were received from Messrs. Samuel Cupples and Robert Brookings, covered by a blanket mortgage to the New York Life Insurance Company for a principal sum slightly exceeding $1,000,000 at the time of trial; but this encumbrance was being paid off at the rate of $50,000 per year. These twelve parcels were producing an income ranging between $335,000 and $392,000 per year, and the Collector made no effort to prove the conveyance thereof to the University, or the mortgage

thereon, was fraudulently executed. Practically all the sixty parcels of real estate were regarded by the University as being superior to stocks, bonds and real estate mortgages for investment purposes, especially during the period of the depression.

"Gifts to the University of more than $25,000 each aggregated $26,254,104 at the time of trial. This included all sorts of property, real estate, securities, bonds, stocks and cash. There had been other gifts of less than $25,000 each. The income of the University for the year ending June 30, 1932, from investments was $1,345,449.93, and from tuitions and fees $1,137,294.38, a total of $2,482,744.32. The expenses for that year were $2,363,573.55, leaving a balance of $119,170.77. The institution operates under a budget system and surpluses and deficits for any year usually do not exceed $3000. In most of the departments the tuition is $250 a year, and operating expenses run nearly $500 per year per student. In the Medical School the tuition is $400 per year and the University's annual operating cost per student is $1900. In the year 1932-3 scholarship fellowship funds were distributed to students amounting to $40,066; free scholarships amounted to $50,225, and student loans to $18,000. At the time of the trial the University in almost every department felt the need of further funds for expansion, particularly in the Medical School where it was desired to add a psychiatric institution. The number of students in 1930-1 was 7915; in 1932-3, 7313. We do not find any figures for the year 1931-2. In addition to the regular academic departments there are seven professional schools."

The evidence also established that certain benefactors had relied on the tax exemption clause in making their gifts (R. 103-4).

The Supreme Court of Missouri in the instant case, as in the *Baumann* case, held that respondent's charter exempted it from taxation. That Court further stated that (as there had been no cross-appeal) the issue raised by respondent's plea of *res judicata* was not before it but made the following significant comment: "We find the University's plea of *res judicata* is upheld by the decisions in *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979; and *North St. Louis Gymnastic Society v. James Hagerman, Jr.*, 232 Mo. 693, 135 S. W. 42."

It thus appears that in the *Rouse* case, which was a suit involving St. Louis and Missouri State taxes, this Court has upheld the validity of the respondent's tax-exemption; that in the *Baumann* case the Supreme Court of Missouri has reached the same conclusion where both St. Louis and Missouri State taxes were involved; and that in the instant case the last-mentioned Court has again sustained the exemption—this time as to taxes assessed against real estate in Kansas City. It further appears that the Missouri Court (in the *Baumann* case) has construed the exemption as applicable to *all* the property of respondent —whether real or personal and whether used directly for university purposes or as a producer of revenue for the attainment of those purposes and has observed, by way of dictum, that under all these circumstances *res judicata* is a valid plea.

II.

SUMMARY OF ARGUMENT.

The argument of the respondent is an amplification of the following propositions:—

1. This Court cannot be compelled to regard "the laws of the several States" as "rules of decision" in cases involving alleged violations of the Constitution of the United States; and the Judiciary Act of 1789, as construed in *Erie R.R. v. Tompkins*, attempts no such compulsion. In the instant case, however, the respondent recognizes no inconsistency between Missouri law and the law as laid down by this Court.

2. The power inherent in a Court to prevent repeated litigations of the same issue should be exercised in this case by affirming the decree of the Supreme Court of Missouri.

3. The exemption from taxation offered by the legislature of Missouri to the incorporators of respondent, by them accepted according to the terms of the grant and for ninety years treated as a part of respondent's financial structure, is a valuable contractual right which the State cannot constitutionally impair.

On the basis of these propositions the respondent respectfully urges that the judgment of the Supreme Court of Missouri be affirmed.

III.
ARGUMENT.

1. This Court Cannot Be Compelled to Regard "The Laws of the Several States" as "Rules of Decision" in Cases Involving Alleged Violations of the Constitution of the United States: and the Judiciary Act of 1789, as Construed in Erie RR. v. Tompkins, Attempts No Such Compulsion.

It is respectfully suggested that the petitioner has misconceived the decision in *Erie R.R. v. Tompkins*, 304 U. S. 64 (1938) and that the inference which he draws from it is essentially unsound.

That decision deals only with the situation in which federal jurisdiction depends solely upon diversity of citizenship. In that situation Congress has prescribed that the laws of the several States shall be regarded as rules of decision; and this Court has interpreted "laws" to include unwritten as well as written laws. Where (as here) the jurisdiction exists because a provision of the Constitution of the United States is drawn in question, the respect shown by this Court for State law is not the result of compulsion but of policy. Surely this policy will never be so extended as to result in an abdication of the constitutional function of this Court; but that is precisely what would happen if the petitioner's theory were to be accepted and acted upon.

Petitioner's argument runs substantially as follows: Under the law of Missouri the charter of respondent was not an enforceable contract because it lacked consideration; this Court, in *Washington University v. Rouse*, failed to follow the Missouri law and reached an independent con-

clusion that there was consideration for the contract; the court below in the case at bar followed the law as established by this Court rather than the law of Missouri; the decision of this Court in the *Rouse* case ignored the Missouri law, because of the rule of *Swift v. Tyson,* 16 Peters 1 (1842); *Erie R.R. v. Tompkins* has now overruled *Swift v. Tyson;* therefore, says petitioner, this Court must now revert to, and accept as binding, the conclusions of the Missouri court in *Washington University v. Rouse,* 42 Mo. 308.

There are two defects in such an argument, the first of which is fundamental. This is the assumption that by the *Erie* decision this Court has abdicated its constitutional function. This section of this brief is devoted to that point. The second is the assumption that an affirmance would be inconsistent with the law of Missouri. This latter assumption is based in turn upon the theory that the conclusions of the Missouri Supreme Court in the *Rouse* case represent the views of that Court today. This point will be discussed in a succeeding section.

The *Erie* case involved the construction of Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C., Section 725. This section provides:

> "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In *Swift v. Tyson,* it had been held that Federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court;

but that they are free to exercise an independent judgment as to what the common law of the State is or should be. (*Erie R. R. Co. v. Tompkins,* supra, p. 71.) The *Erie* decision was to the effect that a Federal court exercising jurisdiction on the ground of diversity of citizenship must, in every case, apply the State law as declared by the State courts.

This rule, however, has no application in cases involving the Constitution, treaties[2] or statutes[3] of the United States. As Mr. Justice Brandeis observed in the *Erie* case: The law to be applied in any case is the law of the State "*except in matters governed by the Federal Constitution or by Acts of Congress.*" (*Erie R. R. Co. v. Tompkins,* p. 78.)

In determining in the *Rouse* case that the charter of respondent was entitled to the protection of the Constitution, this Court was not following the rule of *Swift v. Tyson.* It was applying a principle which was in existence before *Swift v. Tyson* was conceived and which has been followed consistently since *Swift v. Tyson* has been overruled—namely, that in cases involving the asserted impairment of a contract under Article I, Section 10 of the Constitution, this Court will itself determine whether a contract existed, what were its terms and conditions, and whether that contract had been impaired. While this Court has always given great weight to the decisions of State courts and, in doubtful cases, has always adopted the construction placed upon the contracts or statutes by the State courts, it has never abdicated its right to apply its own independent

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[2] *Board of County Commissioners of Jackson County v. U. S.,* 308 U. S. 343 (1939).

[3] *Deitrick v. Greaney,* 309 U. S. 190 (1940). *Baltimore & Ohio R. R. Co. v. Kepner,* 86 L. Ed. 37 (1941).

judgment.[4] This right is a necessary result of the supremacy of the Constitution and of the vesting in this Court of the judicial power of the United States.

At the time this brief is written, the latest expression of the rule is contained in an opinion by Mr. Justice Jackson, in the case of *Irving Trust Company, et al. v. Day*, 86 L. Ed. 349 (1942). In a case involving an asserted conflict between an antenuptial agreement and the New York Decedent Estate Law, it was there said:

> "When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court."[5]

Petitioner concedes that this is the law (Petitioner's brief, p. 9), but asserts that this Court must adopt the decision of the State court unless it is "wholly arbitrary and contrary to reason." It is, of course, the settled policy

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[4] Of the earlier cases giving expression to the rule, the following may be cited: *Piqua Branch Bank v. Knoop*, 57 U. S. (16 How.) 369 (1853); *Jefferson Branch Bank v. Skelly*, 66 U. S. 436 (1862); *Bridge Proprietors v. The Hoboken Co.*, 1 Wall. 116 (1863); *Delmas v. Merchant Insurance Co.*, 14 Wall. 661 (1871).

[5] Other recent expressions are to be found in *Hale v. State Board*, 302 U. S. 95 (1937), opinion by Mr. Justice Cardozo; *Indiana, ex rel. Anderson v. Brand*, 303 U. S. 95 (1938), opinion by Mr. Justice Roberts; *Rapid Transit Corp. v. New York*, 303 U. S. 573 (1938), opinion by Mr. Justice Reed; *Higginbotham v. City of Baton Rouge*, 306 U. S. 535 (1939), opinion by former Chief Justice Hughes; *Wood v. Lovett*, 313 U. S. 362 (1941), opinion by Mr. Justice Roberts.

of this Court to lean toward agreement with the courts of the State and to accept their judgments in determining whether a given set of facts gives rise to a contract. On the other hand, as petitioner admits, there are cases where this Court recognizes its obligation to reach its own independent conclusion. This occurs, among other situations, where the State court ruling is so far out of line with prevailing contract principles that it operates to deprive a party to the contract of his constitutional protection against impairment. If it were otherwise, as this Court has often observed: "the contract provision could always be evaded by the State courts giving such construction to the contract, or such decision concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation": *Delmas v. Merchant Insurance Company*, 14 Wall. 661 (1871).

The *Rouse* case was just such a decision. It did not involve doubtful questions of construction or the interpretation of intricate statutory provisions. On the contrary the ruling of the State Court in that case was that the grant of respondent's charter was without consideration and was therefore not contractual in its nature. This ruling constituted a marked and unjustifiable departure from the generally accepted principle that the charter of such a corporation as the respondent, accepted by the incorporators and acted upon in good faith, is based upon an adequate consideration and is therefore entitled to constitutional protection.

Petitioner's argument, if accepted, would leave this Court powerless to correct the errors of a State court in this or any other similar situation. We submit that such is not, and cannot be, the law.

2. The Power Inherent in a Court to Prevent Repeated Litigations of the Same Issue Should Be Exercised in This Case by Affirming the Decree of the Supreme Court of Missouri.

Apart from his argument as to the effect of the *Erie* decision, petitioner contends that the Court below should be reversed because *Washington University v. Rouse*, 75 U. S. (8 Wall.) 439 (1869) was wrongly decided.

For the reasons given in the next section of the brief, we submit that the *Rouse* case was correctly decided. Apart from the merits, however, it is our proposition that the issues here presented, having been litigated on three occasions, should be considered as settled.

This case is an unusual one. Unlike the ordinary case to come before this Court, it does not require the application of general principles to a new set of facts. On the contrary, the identical legal issues have been raised and have received judicial determination in three cases, all brought by local tax collectors of Missouri and involving the same type of property—first, in the *Rouse* case, decided by this Court; second, in *Washington University v. Baumann, supra;* and again by the Supreme Court of Missouri in the case at bar. Each case has been determined favorably to respondent.

The *Rouse* case involved an attempted assessment of State, Military, County and School Taxes against the property of respondent by the Collector of Revenue of St. Louis County. It is a fact of record that Rouse attempted to assess taxes against several pieces of productive property (R. 86). This Court held that the charter in terms exempted the property from taxation and that the charter was a contract, and so entitled to protection against im-

pairment. The decision applied to the case the principles of *Home of the Friendless v. Rouse*, 75 U. S. (8 Wall.) 430 (1869), decided the same day against the same collector on a charter involving identical language.

The *Baumann* case was decided in 1937. The taxing official in that case was the Collector of the City of St. Louis. The taxes involved were State, City and School Taxes. The real estate was also productive property. Once again it was held that the property was tax-exempt. The court also took occasion to dismiss the further contention advanced by the taxing authority that changed conditions, reflected by a substantial increase in the amount of property owned by the University since 1869, when the *Rouse* case was decided, opened the way for its taxation. The theory underlying this contention was that the University had absorbed more property than necessary to accomplish the purpose for which it was chartered; i. e., the maintenance of an educational institution of high merit. The contention was based upon a *dictum* in the majority opinion of this Court in the *Rouse* case to the effect that "should a state of case in the future arise, showing that the corporation has pursued a different line of conduct [that is, has increased its property holdings beyond its charter requirements], it will be time enough then to determine the rights of the parties to this contract, under the altered condition of things" (p. 441). In making this observation, this Court stated that such an abuse was not to be feared or presumed. The Missouri Supreme Court found no evidence warranting such a fear or presumption. It concluded that the additional property acquisitions were not beyond the needs of the University as an educational institution, and consequently not *ultra vires* in character. In so deciding, the Court stated:

> "And if a determination of that question be requisite to an ascertainment of the corporation's liability for taxes the general rule is that it can be raised only by the State in a direct proceeding for that purpose (authorities cited)."

So, as late as 1937, the Missouri Supreme Court was unimpressed with the assertion that the property holdings of the University had increased to such a size that they were beyond its educational needs and represented *ultra vires* acts. The instant record reveals no change. Indeed, petitioner agreed below that the testimony in the *Baumann* case be adopted as the evidence in this case.

Summarizing, we find that the judgments in the *Rouse* and *Baumann* cases are express and definitive adjudications of the following issues:

(1) The charter of Washington University is a valid contract within the protection of Article I, Section 10, of the United States Constitution, which may not be impaired by subsequent legislation.

(2) The tax exemption clause is an enforceable part of the contract, and not subject to revocation.

(3) The tax exemption clause embraces within its scope all property owned by the University, with the sole limitation that the property itself, or the income received therefrom, must be used in aid or support of its educational functions.

(4) The tax exemption clause is not limited in its operation to property originally acquired by the University, but extends to all property—no matter when obtained—if used, directly or indirectly, for educational purposes.

In the instant case, the taxing officials are the City Treasurer and the City Assessor of Kansas City and, again, the subject matter of the suit is productive real estate. The taxes involved are general city taxes. The issues presented are identical. In fact, they could not be otherwise, as the evidence is the same.

Under these circumstances, we submit that the instant case should be affirmed on the principle of *res judicata*.

It is established that the doctrine of *res judicata* applies in tax cases, and this is so even though the taxes in the prior litigation are for different years than those in the subsequent suit: *New Orleans v. Citizens' Bank*, 167 U. S. 371, 398 (1897); *Tait v. Western Md. Ry. Co.*, 289 U. S. 620, 624 (1933); *U. S. v. Stone and Downer Co.*, 274 U. S. 225, 230-231 (1927). It is true that where different tax years are involved, the original adjudication does not act as a complete bar to subsequent litigation but is merely conclusive as to all matters actually litigated and adjudicated in the prior suit: *Tait v. Western Md. Ry. Co.*, (supra, p. 623); *Va.-Car. Chemical Co. v. Kirven*, 215 U. S. 252 (1909). This limitation, however, does not forbid the operation of *res judicata* in the instant case. The identical issues here raised were litigated and adjudicated in the *Rouse* and *Baumann* cases. Finally, in the application of *res judicata*, it is immaterial that the original adjudication may have been predicated upon an erroneous concept of the law. *Deposit Bank v. Frankfort*, 191 U. S. 499, 510-511 (1903); *U. S. v. Moser*, 266 U. S. 236, 242 (1924); *Reed v. Allen*, 286 U. S. 191, 199 (1932). Of course, this observation does not concern us here because, as will be shown in the ensuing discussion, the legal principles applied in the *Rouse* and *Baumann* cases were correct.

The Missouri concept of *res judicata* in tax cases is identical with the principles as applied by this Court in similar cases: *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979 (1903); *North St. Louis Gymnastic Society v. James Hagerman, Jr.*, 232 Mo. 693, 135 S. W. 42 (1911), both involving the taxable status of corporations under their charters. We mention this because the effect to be given a judgment of a State court is a question to be determined by the State or local law: *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 75 (1903); *Wright v. Georgia R. R. & Banking Co.*, 216 U. S. 420, 429 (1910); *Oklahoma Packing Co. v. Gas Co.*, 309 U. S. 4 (1939). As the law of Missouri parallels that of this Court with respect to *res judicata*, both the *Rouse* judgment and that rendered in the *Baumann* case are to be given similar weight. The Missouri Supreme Court in the instant case found that the University's plea of *res judicata* is upheld by the decisions in *Kansas City Exposition Driving Park v. Kansas City* and *North St. Louis Gymnastic Society v. James Hagerman, Jr.*, supra. In making this observation, the Court did say that the plea of *res judicata* was not before it, for technical reasons of a procedural nature; but there was no occasion for that Court to decide the issue of *res judicata*, since it had already ruled in favor of respondent on the merits. As *res judicata* was pleaded and proved by respondent, this Court should, as a matter of right and justice, affirm the judgment in favor of respondent on that ground, if it believes that the Missouri Supreme Court erred in its decision on the merits.

In asking this Court to apply the rule of *res judicata* to the case at bar, we are frank to admit that in the literal sense of the term, there is no identity of parties. The

Kansas City officials, who are petitioners here, were not parties in the *Rouse* and *Baumann* cases. On the other hand, two facts are present which we submit are sufficient to establish substantial identity for the purposes of the rule. In the first place, the defendants in the two former cases were collecting State as well as local taxes, and hence were agents of the State in fact as well as in theory. This being so, we think it is fair to say that the prior judgments were binding on the State of Missouri. If the State is bound, then all municipal subdivisions to which the State has delegated taxing power should also be bound. In the second place, petitioner agreed to adopt the evidence in the *Baumann* case as the evidence in this case. This is a concession that petitioner was entirely content to accept the *Baumann* record as definitive of the issues. Therefore, petitioner can have no cause for complaint if he is placed in the shoes of Baumann for other purposes.

The function of the doctrine of *res judicata* is to make for certainty in human relations by giving repose to litigation and preventing constant reconsideration of settled questions. Beyond this, it has the incidental advantage of relieving the courts of the burden of hearing the same issues litigated between the same parties or their privies on more than one occasion. If the principle of *res judicata* cannot be invoked in this case, it is difficult to imagine when an end can be expected to litigation.

But even if this Court feels that all of the elements of *res judicata* are not present, we submit that the prior decisions should be considered as binding. If the issues are *res judicata*—minus, they are at least *stare decisis*—plus. Equity has always recognized the right of a court to prevent unnecessary relitigation by numerous parties where common questions of fact or law are involved. A familiar

example is to be found in the class suit. Here a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them as if all were before the court.[6] The reason behind the rule is that continued litigation on the same question is unnecessary, where the interests of all are properly protected in the initial action.

The instant case presents an analogous situation, and the reasons for calling a halt to litigation are the same. The problems involved were maturely considered by this Court in the *Rouse* case; they were again examined at length and on the merits by the Supreme Court of Missouri in the *Baumann* case; and a third time by the Court below. Every possible issue has previously been presented and decided; and petitioner's acceptance of the testimony in the *Baumann* case is conclusive evidence that he considered the former record to be satisfactory.

In view of the fact that respondent's property has been accorded tax exemption for almost ninety years, despite three assaults upon it, it is submitted that the principle should now be considered as settled and that it would serve no useful purpose to re-examine the question. A decision of this Court, and two subsequent decisions by the highest

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[6] See for example, *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662 (1915), where a decree in a class suit involving a mortuary fund was held entitled to full faith and credit in a second suit by a member of the class not a party to the first suit; and *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356 (1921), involving a class suit respecting the control of trust funds belonging to a fraternal benefit association, in which it was held that the District Court might properly enjoin members of the class, not parties to the first suit, from bringing a second suit to reopen the questions.

court of the State of Missouri, should be enough to set the matter at rest where no new points are presented for adjudication.

3. The Exemption From Taxation Offered by the Legislature of Missouri to the Incorporators of Respondent, by Them Accepted according to the Terms of the Grant and for Ninety Years Treated as a Part of Respondent's financial Structure, Is a Valuable Contractual Right Which the State Cannot Constitutionally Impair.

If this Court does not accept the view that sufficient judicial attention has already been given to the tax exemption clause in this charter and prefers again to consider that matter, we suggest that the issue may properly be stated thus:—whether a tax-exemption clause in the charter of an educational institution is valid and irrevocable where (1) there was no local constitutional impediment to the granting of the exemption; (2) the exemption clause itself is unambiguous and clearly embraces the type of property involved; and (3) there is no showing either of any abuse of legislative power in the original grant or of any such present local emergency as might justify relaxation of a constitutional guaranty.

The respondent urges that upon such a record this Court should declare the exemption contract to be inviolable; and further suggests that the discharge by this Court of its constitutional function is made less drastic in the instant case because there is no sufficient reason to believe that the law of Missouri on the point in issue differs in any degree from the law as declared by this Court.

The following considerations are advanced to justify the assumptions above made in the statement of the issue

and to support the respondent's plea for an affirmance of the judgment of the Supreme Court of Missouri:

(1) *There was no local constitutional restraint against the granting of the exemption.*

It is clear that the Constitution of Missouri in existence at the time the charter was granted imposed no restraint upon the inherent power of the State legislature to grant a tax exemption. This has been expressly ruled by the Supreme Court of Missouri in the *Baumann* case (*supra*, at p. 712):

> "The State Constitution of 1820, in force at that time, imposed no limitations on the legislative power to enact local or special laws, or laws granting exemption from taxation."

Under well-settled principles, this interpretation of its own Constitution by the Missouri Supreme Court may be accepted as conclusive.

(2) *The exemption clause is unambiguous.*

Nor does the instant case present any question respecting the scope or meaning of the exemption clause. Respondent's charter specifically gives it power to hold any real or personal estate "which may conduce to the support of said Seminary or to the promotion of its objects." It furthermore specifically provides that "all property of said corporation shall be exempt from taxation." Since the corporation has specifically been given power to own income-producing property, and since its charter in terms exempts *all* of its property from taxation, the petitioner makes no contention that the exempting clause is limited to property actually occupied for University purposes. Indeed it would be futile to make such

a contention because the Supreme Court of Missouri has settled the matter by the following finding:

> "As to the use of its property, it is obvious from the provisions of the charter and the explicit declarations in the Washington University case, supra, that the University is not limited to real estate actually occupied and directly used for educational purposes. All that is necessary is that the land be used to *support* its educational establishments."
>
> (*Washington University v. Baumann, supra,* at p. 721)

In view of the actual decisions as to the income-producing property of respondent and in view of the express ruling on the point by the Supreme Court of Missouri, we submit that the question of the scope of the exemption is no longer open for consideration. It is, however, interesting to note that while this Court has always adopted a rule of strict construction of tax exemption clauses, the Supreme Court of Missouri has established a more liberal rule. This will appear if reference is made to *State, ex rel. Waller v. Trustees of William Jewell College,* 234 Mo. 299 (1911). The act creating Jewell College exempted from taxation the "lands" then owned by the college and "all the lands that may hereafter be devised or granted to said college." At that time real estate formed the only endowment of the college. Thereafter some of the endowment fund was invested in personalty and the question was whether the exemption was or was not limited to land. The Missouri Court held that the word "lands" was the equivalent of "property" and included the personal property held by the college in its endowment fund. The Court there said (at p. 308):

"The courts have never been over-anxious to apply the rule so as to impose burdens upon religious, scientific, literary and educational institutions. Strict construction has largely been applied to corporations organized for profit and gain, not to corporations performing a public service."

(3) *There is no showing of abuse of power or of the existence of a local emergency.*

The respondent urges that in the absence of some exceptional or extraordinary situation this Court should reaffirm the contractual character of charters of this type and the inviolability of tax exemptions included in them.

The *Dartmouth College* case established the principle that a charter is a contract within the meaning of the Constitution. In *New Jersey v. Wilson*, 7 Cranch (11 U. S.) 164 (1812) this Court first recognized the power of a State legislature to grant by contract a binding exemption from taxation. That power has been recognized by this Court, without exception, to this day. We believe it is unnecessary to cite cases in support of the proposition. It has recently been recognized in *Macallen Co. v. Mass.*, 279 U. S. 620 (1929). *New Jersey v. Wilson* was last cited with approval in *United States v. Bekins, et al.*, 304 U. S. 27, 52 (1938). Two outstanding cases upholding the validity of tax-exemption clauses in charters of charitable and educational institutions are *University v. People*, 99 U. S. 309 (1878), a case involving Northwestern University; and *Asylum v. New Orleans*, 105 U. S. 362 (1881).

While the petitioner is not, in so many words, asking this Court to overrule *Dartmouth College v. Woodward*, he is urging that there is something so exceptional in this particular charter that the Court should not apply to it the well-settled rule.

There is obviously nothing unusual in the character of the charter or in the nature of the educational activity which it contemplates. The charter was granted at a time when the State welcomed the establishment of private institutions of learning as valuable adjuncts to a system of public instruction which had not yet attained its full stature. Had there been no grant of tax exemption the legislature might have been indifferent to the type of educational activity in which the institution was to engage. Since, however, the tax exemption was in the nature of an annual appropriation of public funds in aid of the enterprise it was deemed proper to stipulate that the instruction given should not be "sectarian, religious or political". Thus the State safeguarded its grant and made its contribution to an institution engaged in the very activity which all the States of the Union have always been active in promoting.

Nor is there any feature of the charter which takes it out of the category of grants made upon sufficient consideration. There was the usual acceptance of the charter by those to whom it was tendered and the usual outpouring of generous gifts made to effectuate what the State had approved. Indeed there is reason to believe, as indicated in the *Baumann* case, that the exemption was in fact relied upon by certain large benefactors as an inducement to do their share.

There being nothing unusual in the charter and the consideration for the grant being evident, the petitioner has no alternative but to attack the inviolability of a perpetual tax-exemption—as such; and this he does on the double ground that the granting of tax exemptions is liable to abuse and that it is objectionable as involving a surrender of sovereignty. This (as to the second ground) is to revive the contention so forcibly made by Mr. Justice Miller

in his dissenting opinion in the *Rouse* case—a contention then rejected by the majority and since silently ignored in the many cases in which exemptions have been upheld.

Petitioner in effect insists that this Court should now abandon this long-settled policy. He asserts broadly that the taxing power is the most basic power of government and that, if such exemptions are recognized, "a transient legislature may destroy the foundation upon which an ordered society must depend." We submit that such generalizations do not meet the problem realistically. We recognize, of course, that taxation is a basic power of government. We also recognize that the power of a legislature to bind succeeding legislatures in the realm of taxation is not without limit. But situations justifying a relaxation of constitutional guaranties must actually exist before legal rights can be affected. It is almost naive to imagine that mere assertion is a subsfitute for reality. That no such situation has existed or is likely to exist in Missouri is a necessary inference from the following significant utterance of the very court whose judgment is hereunder attacked:—

> "Now with this situation let us take up the exemption statute in question. Starting with the proposition that the State was limiting the use of the property to be acquired by the corporation to a much-needed and public use, what means this exemption statute? We say much-needed use, because we cannot blind our eyes to the public history of our State. Of such things courts take judicial cognizance. We should never lose sight of the fact that by this Act of 1849, the State was licensing the twenty-six men and their successors to solicit and receive property of all kinds (not lands alone) from charitably disposed people, but in the interest of the State was impounding every cent of it

for a public purpose. It costs to run public schools, and in those days the State was not situate as it is now. But even now, were it not for the great institutions of learning founded, as was this defendant, it would require at the hands of the State twice its present outlay for higher education. If a reason for the fixed public policy of those days be required, herein we have it." (*State ex rel. v. Trustees of William Jewell College, supra*, p. 316.)

This leaves only the bare proposition that the power of taxation can never be surrendered to any extent because it is inherent in sovereignty. This proposition sometimes has been advanced but never accepted. On the other hand, it has been as eloquently proclaimed that the granting of a tax-exemption is in itself an exercise of sovereignty. It seems to us that neither of these propositions meets the problem head-on. Every legislature is sovereign in its own sphere and every act of a legislature is an exercise of sovereignty. But it is conceded that the contract clause applies to the contracts of States. If this is so, then every contract of a State is a self-imposed limitation on sovereignty as respects the matters contained in the contract. The real question therefore is not whether the State can bargain away its sovereign power but whether the particular bargain satisfies our concepts of an enforceable contract.

Petitioner urges that the principle subjecting contracts to legislative impairment in the exercise of the police power and the power of eminent domain logically should have full application to contracts granting tax exemptions. We do not believe this analogy is well taken. It is true, as petitioner states, that all three powers are inherent powers of sovereignty. On the other hand, there does exist

a distinction which separates the tax power from the other two in so far as the contract clause is concerned. The police power, generally speaking, comprehends the enactment of legislation to promote the order, safety, health, morals and general welfare of society. The power of eminent domain may be defined as the right of the State to resume dominion over property in the public interest, or the taking of property for public use. It is settled, and with sound reason, that the State legislatures cannot surrender by contract the right to exercise these powers. This principle is based upon the theory that the sanctity of contracts is subordinate to the general welfare of the people and cannot operate to stay the legislative hand in the enactment of measures designed to promote their health, safety and morals. This principle does not have unrestrained application in the field of taxation. Taxation is the imposition of burdens or charges upon persons or property to raise money for public purposes. Taxes are in payment for the service and protection which the government affords the taxpayer and his property. It has been recognized that the power to exempt from taxation, like the power to tax, is an attribute of sovereignty. This is because public policy motivates the award of exemptions where they forward a public interest, such as the creation, maintenance and support of educational, charitable and religious institutions. In such cases, the property being devoted to a public service, there is excellent reason to relieve it of the burden of taxation although the general welfare of all the people requires that it remain subject to proper exercises of police power and the power of eminent domain. Since the people are receiving equal and frequently greater value as compared to the amount of the

exemption, their interests are fully subserved and there is no ground for complaint. This is precisely why irrevocable tax exemptions, based upon valid and adequate consideration, have been held to be entitled to protection from impairment under the contract clause of the Constitution. The instant exemption, being based upon fair and just consideration, is entitled to such protection.

If there is no pressing public reason why respondent's property should be subjected to taxation, is there any reason why the particular contract should not be recognized and enforced? We submit that this question should be answered in the negative. Education is one of the main objectives of any government. It is specifically stated in the Missouri Constitution of 1865, and again in the present Missouri Constitution of 1875, that education is essential to the preservation of the rights and liberties of the citizens of that State. (See opinion below, R. 178.) Respondent is making its contribution to the attainment of that objective. If by a tax-exemption clause the legislature secures the foundation of an educational institution, then it cannot be said that the State is not receiving adequate consideration for the promise. It is true that by granting the exemption the State is relinquishing its right to secure revenues from the properties of the institution. But such an institution is supplying for some of the citizens of the State what the State itself is in some fashion bound to supply. When, therefore, the State gives up its right to tax to such a limited degree, it cannot be said with conviction that it is surrendering enough to place the State in peril or even to prejudice the public welfare, since the people are receiving, through the functioning of the institution, a benefit proportioned to the value of the grant.

Petitioner does not and cannot deny the great value of the public service which respondent renders to the people of Missouri. Nor does petitioner attempt to portray respondent as an extravagant and non-essential institution which might be abandoned without injury to the public interest. The suggestion is made that if the tax-exemption clause remains in effect respondent will somehow in the future go on increasing the number of its tax-exempt properties without limit. We venture to suggest that no serious attention should be given to this argument. It presents one of those fanciful fears which have no basis in reality. As long as exempted properties are properly devoted to educational purposes or to the support of an educational institution, a corresponding benefit results. If respondent should, by any chance, acquire more property than it needs for educational purposes, or should it misuse that property, or violate the restrictions in the charter, then, as pointed out in the *Baumann* case, the State would have full authority to call upon respondent to account in direct proceedings against the corporation. The existence of this power is in itself an effective protection against the supposed evils conjured up by the petitioner.

It must steadily be borne in mind that respondent's objectives have no tinge of selfishness. It is not a corporation organized for profit. It is not seeking to take money from the people of Missouri without bearing its share of the burdens of government. Instead it is performing a necessary governmental function. If, for such performance, the legislature pays the price of tax exemption, we fail to see how such a contract can be condemned as inconsistent with public policy. We submit that the answer can best be summarized by the following quotation from the opinion of the Court below:

"Being of this mind it is not necessary to discuss other points raised by appellants about the wisdom of granting such a charter. In many instances the power to do so was abused so that it has since been abolished or cautiously guarded. But under the protection of the Federal Constitution even grants which turned out to be improvident are beyond the reach of the State. In this instance however it cannot be said that the grant was improvident. When it was made the constitution provided that 'schools and means of education shall forever be encouraged.' Const. 1820, Art. VI, Sec. 1. The Legislature properly deemed the purposes for which the University was organized to be beneficial to the people. Here were a group of public-spirited and unselfish men generously seeking to establish an educational institution at private expense which to some extent would relieve the State in that field. Laws for the creation of a university supported by the State had been adopted only fourteen years before. It was the burdensome obligations on the State arising 'from a false and ruinous (fol. 180) system of loaning its credit to corporations by which it incurred an immense debt' and from the conditions following the civil war all calling for exceedingly onerous taxation which brought about the all-inclusive change of policy through the restrictions in the 1865 Constitution. 42 Mo. l. c. 326. At the same time the principle that education was essential to the preservation of our rights and liberties was reasserted (Const. 1865, Art. IX) and it was again later in the Constitution of 1875 (Art. XI). Verily the same is true today." (R. 178.)

Brief reference may be made at this point to the contention that the amendment of respondent's charter had the effect of removing its exemption from taxation. This contention is unsound. The amendment expressly pro-

vided that "The said corporation shall have, hold and enjoy all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to The Eliot Seminary." (R. 5.) The word "immunities" expressly preserves the tax-exemption. Furthermore, the amendment was made in 1857, and so before the Constitution of 1865. The cases cited by petitioner (Petitioner's brief, p. 28) are not applicable. They involve situations either where the amendment contained no saving clause, or where the corporation accepted a grant of new privileges after a change in the Constitution, and so was deemed to have accepted those privileges subject to the Constitution then in existence.

In view of these considerations the respondent would urge the Court to accord it constitutional protection even if in order to do this it were necessary to differ from the Supreme Court of Missouri. In fact, however, the respondent is pleading for an affirmance of the judgment of that Court and is not aware of any rule of Missouri law inconsistent with such affirmance.

The petitioner would have this Court believe that its decision in the *Rouse* case is inconsistent with the settled law of Missouri. This statement deserves critical examination. It is based upon two decisions—*City of St. Joseph v. Hannibal and St. Joseph R. R. Co.*, 39 Mo. 476 (1867) and *Washington University v. Rowse*, 42 Mo. 308 (1868), the decision from which the original appeal was taken by respondent to this Court. In the *St. Joseph* case the City levied a tax against certain real estate owned by a railroad and situated within the corporate limits of the City. The charter of the railroad provided that the stock of the company should be exempt from all State and county taxes, and it had previously been decided that this provi-

sion exempted the property of the company itself from state and county taxation, since the property was represented by the stock. The railroad contended that the exemption was broad enough to cover not only the taxes specified in the charter but also taxes levied by the City. This contention was rejected by the Supreme Court of Missouri. In the course of its opinion the Court stated (page 479):

> "There can be no doubt of the power of the legislature to repeal a temporary rate of taxation, and impose another and higher rate, or additional taxes, by virtue of the State sovereignty over the whole subject of taxation, *unless there has been some express contract in limitation of the power upon a consideration deemed to be a part of the value of the grant of a charter.*" (Italics ours.)

This case, therefore, by no means supports the proposition that the *Rouse* decision by this Court was opposed to the then settled law of Missouri. The *St. Joseph* case merely stands for the familiar proposition that an exemption ought not by construction to be extended indefinitely beyond its express terms. The case does not decide that a charter is not a contract or that the legislature lacks the inherent power to bind the State by the promise of tax exemption. On the contrary, as will be seen from the above quotation, it expressly recognizes the principle that the legislature may bind the State not to impose additional taxes if by a promise based upon a consideration it has expressly limited its own taxing power.

Nor does the decision of the same Court in the *Rouse* case support petitioner's proposition. The Missouri court did not hold that the legislature could not, under any cir-

cumstances, grant an irrepealable tax exemption. On the contrary the court said (page 323):

> "Therefore one Legislature cannot pass a law irrevocable or irrepealable in its character unless it has imparted to it something in the nature of a compact or contract which will preserve it inviolate under the inhibition of the national constitution. A law which seeks to deprive the Legislature of this inherent and vital principle of sovereignty—the power of taxation—must be so clear, explicit, and determinate, that there can be neither doubt nor controversy about its terms or the consideration which renders it binding."

Thus the Missouri Court in the *Rouse* case again recognized that a tax exemption is binding if contained in a contract based on a consideration. The weakness which the State Court imputed to the tax exemption claimed by the respondent was absence of consideration for the legislative promise. That this imputation was erroneous was the point on which this Court reversed the State Court. The charter of respondent was like any other charter granted to the incorporators of an institution of learning or of a charity. True it contained no express statement of a consideration. But in all such cases the grant is treated as an open offer which, if accepted by the incorporators and later acted upon, becomes a contract by offer and acceptance. This, in last analysis, is the basis of the decision in *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); and while the State Court paid lip-service to that classic, what it did in effect was to reject the doctrine which this Court had therein established as a fundamental principle of American law. When, in the *Rouse* case, this Court reversed the judgment of the State Court, it did so because the *Dartmouth College* decision was recognized as con-

trolling. In so deciding this Court said (see *Home of the Friendless v. Rouse, supra*, at p. 436):

> "It is observed that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistake in view of the law on this subject.
>
> "There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College v. Woodward*."

Since the acceptance of the grant contained in the charter constituted a contract and since the tax exemption was clear, the institution was granted relief from the tax.

It is accordingly submitted that the petitioner has wholly failed to show that there was any "settled law" in Missouri denying to charters such as this the quality of a contract. Until the *Rouse* decision the founders of the University were justified in believing that the *Dartmouth College* case was the law and that their contract would be respected. If there were any law to the contrary in Missouri, it is to be found only in the *Rouse* case itself; and we submit that on appeal this Court, even on the petitioner's theory, was fully justified in rejecting that single decision and in making its own determination as to the validity of the contract.

Just as there was no Missouri law to the contrary prior to the *Rouse* decision, so it cannot be said that there

has since been any intimation that the Missouri Court, if left free to follow its own independent judgment, would not treat respondent's charter as a contract.

That Court has consistently recognized that the charter of corporations for profit *is* a contract and that a tax exemption clause will be upheld as a part of it: *Sloan v. Pacific R. R. Co.*, 61 Mo. 24 (1875); *Scotland County v. Missouri, Iowa & Nebraska Ry. Co.*, 65 Mo. 123 (1877); *Mechanics' Bank v. City of Kansas*, 73 Mo. 555 (1881); *State, ex rel. Trammel v. Hannibal & St. Joseph R. R. Co.*, 101 Mo. 136, 13 S. W. 505 (1890). In *State ex rel. Haeusser v. Dreer*, 78 Mo. 188 (1883) we find the Court asserting that the doctrine of the *Dartmouth College* case "has been adopted by this and the courts of most, if not all the states, of the Union."

The Supreme Court of Missouri has just as consistently applied this doctrine to the charters of charitable and educational institutions; and has recognized the validity of tax exemption clauses in such charters: *President, etc. of St. Vincent's College v. Schaefer*, 104 Mo. 261, 16 S. W. 395 (1891); *State ex rel. Dosenbach v. St. Joseph's Convent of Mercy*, 116 Mo. 575, 22 S. W. 811 (1893); *State ex rel. Morris v. Board of Trustees of Westminster College*, 175 Mo. 52, 74 S. W. 990 (1903); *State ex rel. Waller v. Trustees of William Jewell College, supra.*

As noted above, it was stated in the case last cited that, whereas statutes exempting property from taxation should be strictly construed, the courts in Missouri have never been overanxious to apply that rule so as to impose burdens upon religious, educational or other charitable institutions. In view of this rule of construction and in view of the fact that such charters have been continuously treated as binding contracts by the courts of Missouri for

the past seventy years, we submit that the doctrine advocated by the petitioner is not the law of Missouri today; and that the conception of a charter as a contract is now as much a part of the law of that State as it is a part of the law of this Court.

Upon the whole, therefore, the respondent submits that its charter, including the exemption clause, is a contract which is entitled to constitutional protection and suggests that an affirmance of the judgment below will both accomplish this result and also be in harmony with the law of the State.

Respectfully submitted,

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